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SEE KOK KOL

v.

CHONG KUI SENG & ORS AND ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA

LOW HOP BING JCA

HELILIAH MOHD YUSOF JCA

SULONG MATJERAIE JCA

[CIVIL APPEAL NOS: N-03-203-2007 & N-03-204-2007]

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6 NOVEMBER 2009

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CIVIL PROCEDURE: *Subpoena - Setting aside - Subpoena Ad Testificandum - Appeals against decision allowing applications to set aside writs of subpoenas - Witnesses - Purpose of procuring documents - Whether documents sought privileged documents protected under Official Secrets Act 1972 - Whether there was merit in appeals - Whether appeals dismissed*

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These two related appeals concerned the appellant ('the plaintiff') and two witnesses only, but not the defendants. They arose from the concurrent decisions of the High Court judge and the registrar of the same court. Both of them had allowed the applications by two witnesses *viz* Tan Sri Aseh Haji Che Mat and Tan Sri Abdul Aziz Mohd Yusof to set aside the writs of Subpoena *Ad Testificandum* ('the subpoenas') which were issued at the behest of the plaintiff to compel them to attend as witnesses. The plaintiff had filed the subpoena against the two said witnesses for the purpose of procuring certain documents. The core issue here was that the documents sought in encl. (123) and (127) were privileged documents and protected under the Official Secrets Act 1972. The plaintiff, however, argued that the documents were material and relevant to prove the plaintiff's claim against the defendants, and that the plaintiff had the right to inspect such documents.

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Held (dismissing the appeals)

Low Hop Bing JCA delivering the judgment of the court:

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(1) The affidavits affirmed by the said witnesses revealed that the documents sought by the plaintiff had been classified as official secrets under the Official Secrets Act 1972 and had not been declassified. The averments in these affidavits remained unchallenged and undisputed by the plaintiff. It is trite law

that, in the circumstances, the plaintiff was deemed to have accepted or admitted such averments: *Ng Hee Thoong & Anor v. Public Bank Bhd*, as applied eg, in *Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors*. If the originator or the owner of the documents treated it and the information contained in it as an official secret and clearly marked it and kept it as such, it was not open to anyone to regard it as otherwise; and the law must give protection to such document or information. There was no merit in both the appeals. The decision of the High Court was affirmed. (paras 13, 15 & 19)

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Bahasa Malaysia Translation Of Headnotes

Dua rayuan kaitan ini adalah mengenai perayu ('plaintiff') dan dua saksi sahaja, bukan dengan defendan. Ia dibangkitkan dari dapatan-dapatan bersama Hakim Mahkamah Tinggi dan Pendaftar Mahkamah yang sama. Kedua-dua pihak telah membenarkan permohonan dua saksi iaitu Tan Sri Aseh Haji Che Mat dan Tan Sri Abdul Aziz Mohd Yusof untuk mengenepikan Writ Sapina *Ad Testificandum* ('sepina-sepina tersebut') yang telah dikeluarkan menurut kehendak plaintiff untuk memaksa mereka menghadirkan diri sebagai saksi-saksi. Plaintiff telah memfailkan sepina terhadap saksi-saksi tersebut untuk tujuan mendapatkan dokumen-dokumen tertentu. Isu utama yang berbangkit adalah dokumen-dokumen yang cuba dikemukakan dalam lampiran-lampiran (123) dan (127) adalah dokumen terlindung dan dilindungi di bawah Akta Rahsia Rasmi 1972. Plaintiff, walaubagaimanapun, berhujah bahawa dokumen-dokumen tersebut adalah material dan relevan untuk membuktikan tuntutan plaintiff terhadap defendan, dan plaintiff juga berhak untuk memeriksa dokumen-dokumen itu.

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Diputuskan (menolak rayuan-rayuan)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

- (1) Affidavit-afidavit yang telah diikrarkan oleh saksi-saksi tersebut menunjukkan bahawa dokumen-dokumen yang cuba dikemukakan oleh plaintiff telah dikelaskan sebagai maklumat-maklumat sulit di bawah Akta Rahsia Rasmi 1972 dan tidak diubah status. Penegasan yang dibuat dalam affidavit-afidavit tersebut tidak dibantah dan tidak dipertikaikan oleh plaintiff. Adalah menjadi undang-undang lazim, di dalam keadaan sekitar, bahawa plaintiff telah menerima atau mengakui penegasan tersebut: *Ng Hee Thoong & Anor v. Public Bank Bhd*, seperti

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- A digunakan dalam *Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors*. Jikalau orang yang memulakan atau pemilik dokumen-dokumen menganggapnya dan maklumat-maklumat yang terdapat dalamnya sebagai rahsia-rahsia rasmi dan telah menandakannya dan menyimpannya
- B sebegitu, ia tidak terbuka kepada sesiapa pun untuk menganggapkannya sebaliknya; undang-undang mestilah memberi perlindungan kepada dokumen atau maklumat itu. Tiada kewujudan merit dalam kedua-dua rayuan. Keputusan Mahkamah Tinggi disahkan.

- C **Case(s) referred to:**
Dzulkipli Abdul Hamid v. Public Prosecutor [1980] 1 LNS 91 FC (**refd**)
Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2007] 5 CLJ 171 CA (**refd**)
Maju Holdings Sdn Bhd v. Kamala Devi Ramadass & Anor [2003] 1 CLJ 434 CA (**refd**)
- D *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA (**refd**)

- Legislation referred to:**
Banking and Financial Institutions Act 1989, s. 97(1)
Official Secrets Act 1972, s. 2C
- E Restricted Residence Act 1933, s. 2(i)
- For the appellant - Vasanthi Rasathurai; M/s Shafee & Co*
For the respondent - Najib Zakaria (Munahza Mustapha with him) SFC
- F [Appeal from High Court, Seremban; Civil Suit No: 22-64-1995]
Reported by Suhainah Wahiduddin

JUDGMENT

- G **Low Hop Bing JCA:**

Appeals

- H [1] These two related appeals concern the appellant (“the plaintiff”) and two witnesses only, but not the defendants. They arose from the concurrent decisions of the learned High Court judge and the learned registrar of the same court. Both of them had allowed the applications by two witnesses *viz* Tan Sri Aseh bin Haji Che Mat and Tan Sri Abdul Aziz bin Mohd Yusof to set
- I aside the Writs of Subpoena Ad Testificandum (“the subpoenas”) which were issued at the behest of the plaintiff to compel them to attend as witnesses.

[2] We had on 31 March 2009 dismissed the plaintiff's appeals. As leave to appeal was granted by the Federal Court on 9 September 2009, we now give our grounds. A

Factual Background

[3] The plaintiff was arrested and subsequently put under restricted residence in the district of Kuala Lipis, Pahang for a period of two years commencing 23 February 1993, pursuant to an order issued by the Minister of Home Affairs, under s. 2(i) of the Restricted Residence Act 1933 (s. 2(i)). B C

[4] Subsequently, upon the plaintiff's representation, the Minister gave instructions for an inquiry to be conducted. The inquiry was chaired by the Ministry's Senior Federal Counsel, together with two members *viz* a senior police officer and a senior officer from the Security & Public Order Division of the Ministry (collectively, the "inquiry committee"). D

[5] After deliberations, the inquiry committee recommended to the Minister that the restricted residence order issued by the minister under s. 2(i) be revoked, which the Minister did on 9 April 1985. E

[6] On 13 April 1990, the plaintiff filed a writ of summons against the defendants for malicious prosecution, conspiracy and false imprisonment. In their statement of defence, the defendants denied all these allegations, adding that: F

- (1) the police had taken action based on investigations carried out by them;
- (2) the defendants were not privy; and G
- (3) that the information or statements given to the police are private and confidential.

[7] On 3 September 2004, the plaintiff filed the subpoena against Tan Sri Abdul Aziz bin Mohd Yusof, who was the senior officer in charge of the Ministry, for the purpose of procuring documents pertaining to the inquiry committee that deliberated upon the plaintiff's representation. H

[8] On 20 January 2006, the plaintiff filed the subpoena against Tan Sri Aseh bin Haji Che Mat, the senior officer from the Security & Public Order Division of the Ministry, as a member of I

A the inquiry committee, so as to give evidence relating thereto and reveal the evidence involving investigations carried out by the police against the plaintiff.

B [9] On 8 February 2006 and 15 February 2006, the Ministry's applications *vide* summonses in chambers, *viz* encl. (123) and (127), to set aside the respective subpoenas issued against the two witnesses, were allowed by the High Court. Hence this appeal.

C **Official Secrets Act 1972**

D [10] The core issue submitted by learned Senior Federal Counsel Najib bin Zakaria, assisted by Ms Munahza bt Mustapha, was that the documents sought in encl. (123) and (127) are privileged documents and protected under the Official Secrets Act 1972.

E [11] Learned counsel Ms Vasanthi Rasathurai argued that the documents are material and relevant to prove the plaintiff's claim against the defendants, and that the plaintiff has the right to inspect such documents.

F [12] From the appeal record, we found that the subpoenas require the witnesses to testify and make available the following documents for disclosure:

- G (1) Case File Reference No. KHEDN.O.RR 1392 and all documents contained therein;
- (2) Police reports made in 1984 by all the defendants;
- (3) The records and minutes for the months of February to May 1985 in the plaintiff's file; and
- (4) Other documents related to any of the above.

H [13] We also found that the affidavits affirmed by the said witnesses reveal that the documents sought by the plaintiff had been classified as official secrets under the Official Secrets Act 1972 and had not been declassified. The averments in these affidavits remain unchallenged and undisputed by the plaintiff. It is trite law that, in the circumstances, the plaintiff is deemed to have accepted or admitted such averments: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, as applied eg, in *Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2007] 5 CLJ 171 CA.

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[14] Being official secrets, these documents can only be disclosed if they had been declassified under s. 2C of the Act which, where relevant, merits reproduction as follows: A

2C. A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service ... may, at any time, declassify any document specified in the schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret. B

[15] If the originator or the owner of the document treats it and the information contained in it as an official secret and clearly marks it and keeps it as such, it is not open to anyone to regard it as otherwise; and the law must give protection to such document or information: per Salleh Abbas FJ (later LP) in *Dzulkifli Abdul Hamid v. Public Prosecutor* [1980] 1 LNS 91. C D

[16] By analogy, in *Maju Holdings Sdn Bhd v. Kamala Devi Ramadass & Anor* [2003] 1 CLJ 434 CA, a Writ of Subpoena *Ad Testificandum* and *Duces Tecum* against the first respondent, requiring her to testify in court and produce all the bank's documents, correspondence and books in connection with the accounts of the bank's customer, was set aside on the ground that the disclosure of the information was absolutely prohibited under 97(1) of the Banking and Financial Institutions Act 1989. E F

Fishing Expedition

[17] The next issue, raised for the witnesses, relates to the plaintiff's fishing expedition inherent in the subpoenas issued by the plaintiff. G

[18] Our decision on the above core issue is enough to dispose of both the appeals before us. We therefore do not find it necessary to go beyond that. However, we commend the respective learned counsel for their efforts in this regard. H

Conclusion

[19] We found no merit in both the appeals which we accordingly dismissed with fixed costs of RM5,000 (inclusive of the deposit) to the Government of Malaysia. The decision of the High Court was affirmed. I